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Supreme Court of the United States

October Term, 1950

No. 318

VIOLA HALL MOORE, ADMINISTRATRIX OF THE ESTATE OF LOUIS LEE MOORE, JR., DECEASED,
Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A DOMESTIC CORPORATION,
Defendant.

On Writ of Certiorari To
The United States Court of Appeals
For the Fourth Circuit

BRIEF ON BEHALF OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY

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I

OPINIONS OF THE COURTS BELOW

(1) The opinion of the United States Court of Appeals for the Fourth Circuit appears at pages 86-91 of the record, and is also reported in 184 F. 2d 176.

(2) The opinion of the District Court of the United

States for the Eastern District of Virginia appears at pages 69-70 of the record.

For convenience, the parties will be hereinafter referred to as plaintiff and defendant.

II

SOLE QUESTION PRESENTED BY THE PETITION

The "sole question" presented, according to the Petition for Writ of Certiorari, is whether "the Courts below" (i.e. the District Court of the United States for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit) "*deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely, a jury trial,* by weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses, and drawing ultimate conclusions as to the facts, contrary to those drawn by the jury." (Italics supplied). See heading "C", page 2 of the Petition. A substantially similar statement appears on page 4 of plaintiff's brief, under the heading "Question Presented."

Under heading "D" of the Petition, p. 3, designated "Reasons Relied On For Allowance Of The Writ," the fact is emphasized that the right of "a jury trial" (as distinguished from a trial by the Court and jury) is the only question presented by the petition. We quote from the petition:

> "The United States Court of Appeals for the Fourth Circuit has rendered a decision in probable conflict with applicable decisions of the Supreme Court of the United States *involving the right of petitioner to a jury trial under the Federal Employers' Liability Act.*" (Italics supplied.)

So that the "sole question" presented in this petition, is whether the plaintiff is entitled to a jury trial under the Federal Employers' Liability Act, notwithstanding it may appear from the evidence as a matter of law, that any verdict rendered thereon for the plaintiff would be or is (as held in the present case by the two courts in question) not only contrary to the law and evidence, but without evidence whatsoever, direct or circumstantial, to support it.

Rule 38, paragraph 2 of this Court provides as follows:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

It will be noted that after specifically bringing forward the "right of the petitioner to a jury trial under the Federal Employers' Liability Act," as being the "sole question" presented, the petition goes on to state how the petitioner was "deprived" of the right by the "courts below," to-wit, "by weighing the contradictory evidence, drawing inferences, judging the credibility of witnesses and drawing ultimate conclusions as to the facts contrary to those drawn by the jury."

(1) If there could be language more abstract, more general and less specific than that last above-quoted from the petition, it is difficult to conceive what the language could be. In fact, it is respectfully submitted that the language is merely a "rhapsody of words" made over a "body of contraction"—that body of contraction being the alleged right of trial by a jury alone and not by court and jury as in all other negligence cases.

(2) Apart from the generality of the foregoing language, this unwarranted broadside against the trial court and the Court of Appeals for the Fourth Circuit, is annexed

as a relative clause, argumentative in character, relating only to the alleged means by which "the courts below deprived petitioner of an important part of the remedy afforded railroad workers under the Federal Employers' Liability Act, namely a jury trial." (Petition p. 2).

(3) The general words contained in the foregoing quotation from the petition were taken largely from language used *arguendo* in *Lavender* v. *Kurn*, 327 U. S. 651, 652-653, and have no relevancy to the present case. The present case turns on the testimony of a single witness on a single, simple question of undisputed fact, and that witness being the plaintiff's (Petitioner's) own witness, all of which will be more fully shown below.

Thus, it appears that the only question "*specifically* brought forward by the *petition* for writ of certiorari" (Rule 38, par. 2, cited *supra*) is the alleged right of a "jury trial," without the intervention of the court, in any and all actions brought for damages by a railroad worker under the Federal Employers' Liability Act.

However, the right of a trial court to direct a verdict in a proper case in this class of cases, is not only settled by many recent decisions rendered by this Court; but this fact is conceded on page 32 of plaintiff's brief, as to a case in which there is "manifestly a woeful lack of evidence which could leave a jury nothing but speculation."

(1) In the first place, it will be noted that the exception mentioned in the plaintiff's brief, is not contained in the "Sole question presented" in the petition; and that Rule 38, par. 2, above cited, provides that only the question specifically brought forward by the *petition* for writ of certiorari will be considered.

(2) In the second place, despite the assertion in the plaintiff's brief to the contrary, the present case comes

within the very exception mentioned in the brief, where the court may take the case away from the jury, namely, where there is an utter lack of evidence to support the conclusion reached. That there was a complete absence of any evidence to support the plaintiff's case, was upon mature deliberation definitely adjudicated by the District Court, and on appeal therefrom to the Court of Appeals for the Fourth Circuit, this judgment of the District Court was affirmed as being "clearly right." Moreover, such a conclusion will, we submit, be convincingly established by an examination of the record.

In fact, the plaintiff's brief itself indicates a consciousness of the justice inherent in the decisions of the two courts below and the unassailable character of their conclusions. Otherwise, there would be no occasion (a) for the misstatements, as well as unsupported inferences of fact contained in the plaintiff's brief, as will be hereinafter shown; and (b) The plaintiff has abandoned her contention, as she was logically and authoritatively compelled to do, made at page 26 of her brief accompanying the petition for writ of certiorari—that "negligence and proximate cause," are in this class of cases treated as exclusively questions for the jury; that on these issues "its decision is unassailable," and that it would be "difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict." On the contrary, it is now admitted by the plaintiff in her last brief, at page 20, (quoting with approval from Mr. Justice Frankfurter's opinion in *Johnson* v. *U. S.*, 333 U. S. 46, 54):

> "A trial is not a game of blind man's buff. . . . Federal Judges are not referees at prize fights but functionaries of justice."

III

SINGLENESS AND SIMPLICITY OF THE QUESTION INVOLVED AND NATURE OF THE PROCEEDINGS IN THE COURTS BELOW

The plaintiff's Complaint alleged only one specific ground of negligence, namely, that the plaintiff's decedent, while acting as brakeman for the defendant in a yard switching movement and located "in a position of safety on the rear of the tender" of a locomotive, was caused to be thrown to the ground by the sudden application of the brakes in emergency, in a "hitherto unprecedented and unexpected change in the manner of shifting cars," and without proper warning or signal to the decedent, who was thereby fatally injured (R. 2).

An additional general allegation of negligence "in other respects and particulars," was stricken by the Court from the Complaint, on defendant's motion, after plaintiff had elected not to furnish a more definite statement of such negligence (R. 3, 7). There was no allegation of any negligence with respect to the footboards on the locomotive tender, or as to the brakes, or any other appliances or appurtenances connected with the locomotive or group of cars attached to it. And no violation of any safety appliance acts is in any way involved in this case.

Defendant's answer denied any negligence on its part; denied that the decedent was thrown off the tender by any application of the engine brakes; denied there was any change made in the manner of shifting cars, or that any sudden stop was made while decedent was on the tender. It averred that the decedent, as an experienced brakeman, had full knowledge of the engine movements being made and the physical situation, and further averred that his

injuries were solely due to an accident which could not have been reasonably foreseen or anticipated by the defendant, etc. (R. 4-6).

That the sole question on which the case was submitted by the Court to the jury (under Rule 50 of the Federal Rules of Civil Procedure), was the single specific issue indicated above, is shown by the concluding portion of the trial court's charge, to which there was no objection or exception by either party, where the court said (R. 65):

> "The issue which you have before you is very narrow. It boils down to this: If you believe from the evidence that Mr. Moore was thrown from the tender as the result of the sudden stop or violent jerk which resulted from the unexpected application of the brakes, then you may conclude that the defendant railroad Company is liable for negligence. On the other hand that is the only charge of negligence contained in the Complaint. Unless you believe that, your verdict should be for the defendant."

The plaintiff, on pages 2 and 3 of her brief, admits the above to be the sole issue in the case.

Only one person testified as to how the decedent was injured and the circumstances surrounding it. He was the locomotive engineer (Wilds), the only eye-witness to the accident. He was put on the stand by and testified as a witness for the *plaintiff*; and not even as an adverse witness, as is stated in the petition (R. 18).

Wilds' testimony was unequivocally and emphatically, not only to the effect that *the brakes did not go on the locomotive and train until after the plaintiff's decedent fell, but that he personally saw the plaintiff's decedent fall, and applied the brakes himself subsequent to, and solely because of, the decedent's fall*—an action by Wilds which "humane feelings

required," as stated in the opinion of the Court of Appeals (R. 88). There is no contradiction of Wilds' positive testimony in the record, either direct or circumstantial. On the contrary, the circumstantial evidence, as will hereinafter be shown, fully confirms the testimony of Wilds.

In the memorandum opinion of United States District Judge Sterling Hutcheson, this is said (R. 70):

> "To sustain a verdict in this case it would be necessary to believe that the sudden stop was made before the plaintiff's decedent fell, *and there is no evidence of any kind to support this contention.*" (Italics supplied).

After citing certain decisions of this Court, such as *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Lavender* v. *Kurn*, 327 U. S. 645 and *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, the opinion of the learned judge continues as follows:

> "* * * As I understand the cases, there must be shown some act or conduct from which it is reasonably possible to infer negligence.
>
> "Applying this test to the facts of the instant case, it is my opinion that *there is no evidence upon which the question of negligence should have been submitted to the jury.*" (Italics supplied).

In the opinion of the Court of Appeals, this is said (R. 88, 91):

> "We hold that the District Court correctly sustained Appellee's motion for a directed verdict. We find in the record no evidence sufficient to support an inference of any negligent act on the part of the engineer, or that his stopping the train caused Moore to fall. It is elementary that mere proof that an accident occurred affords no basis for an inference that it was caused by

> negligence * * *. To warrant an inference of negligence, appellant must have proved that the emergency stop was begun *before* Moore fell. This she failed to do."
>
> * * *
>
> "No fact was brought to light which could support an inference that the engineer stopped the train for any reason other than that which he gave in his testimony."

Consequently, the plaintiff's brief at page 4, under the heading "Question Presented", is not only inaccurate but grossly misleading, where it states that the courts below, "had to weigh contradictory evidence, draw inferences, judge the credibility of witnesses, and draw ultimate conclusions as to the facts, contrary to those drawn by the jury."

There was no evidence, either direct or circumstantial, contrary to the testimony of plaintiff's own and sole witness (Wilds), as to the single fact in issue, namely, whether the brakes were put on the train before or after the plaintiff's decedent fell from the footboard of the tender, and Wilds testified that he personally applied the brakes after the decedent fell, as shown above.

IV

STATEMENT OF THE CASE

The opinion rendered by the Court of Appeals for the Fourth Circuit contains an accurate summary of the essential facts established by the evidence, which statement we adopt for the defendant. However, in the plaintiff's "Statement of the Case," as well as in the course of the argument presented in her behalf, various misstatements of the evidence are made and repeated, and a number of unsupported inferences are sought to be drawn therefrom. We cannot

therefore accept the plaintiff's statement of the evidence and facts, and hence find it necessary to restate portions of the evidence, and to call attention to certain additional testimony not referred to in the Court's opinion or in the plaintiff's statement.

Wilds' undisputed testimony was, as hereinbefore indicated, that the brakes were not put on the train until after he saw Moore fall, and that he personally applied the brakes himself on account of and solely because of that circumstance (R. 28, 32, 33). Nobody purported to say that this testimony was untrue.

Wilds also testified without contradiction, that Moore, while "standing" on the footboard of the tender, gave him the original back-up signal to start the train movement, and that he remained standing in the "same place", on the same footboard, until he fell from that footboard (R. 22, 31, 35); that he himself was "leaning out" of the cab window, looking west, "to see if the switch were properly lined and there was anything on the lead-track", and to "see any signals he (Moore) might give" (R. 30, 35); that Moore was facing forward with his back toward him continuously (R. 33); that it would have been Moore's duty to have given a signal if a train had been coming from the opposite direction, but no such signal was required (R. 22, 32); that "the edge of his (Moore's) shoulder and arm" were *continuously* in his (Wilds') view up to the time he fell," during which time he had no trouble keeping him in sight (R. 35).

Wilds also verified that the man shown on the footboard in the photograph taken from a point facing the rear of the tender of engine No. 114, with himself leaning out of the cab window (Defendant's Exhibit B), was in "the same position about", as had been occupied by Moore (R. 35-36, 82). He said that a brakeman in Moore's assignment, stands "on the edge of the footboard", where he gives a "call back

signal with his hand," and "you can see it;" that "he has to get out in view where you can see his hand," and "if he stood behind the tank where you couldn't see the signal, there would be no reason to give it" (R. 24-25).

The evidence of this witness further showed that the train was going at a speed of only five miles an hour; that this particular movement was the first move of the engine with the cars, and was in accordance with the regular routine of duty, the cars having been pulled about ten car lengths in a westerly direction, with Moore occupying the customary position of a brakeman (R. 33, 37); that there had been no rough handling of the cars or jolting of the train, to cause Moore to fall (R. 33); and that the object of the move was to get the cars on the ladder track preparatory to switching them (R. 31). In accordance with custom, the air had been "bled" out of the air brakes on the 33 cars, making it easier to move them around in switching (R. 32).

Wilds also testified that in approaching the No. 12 track switch leading into the ladder track, he could see that it "was properly lined for my movement" (R. 33); that he works "by signals," and was expecting to "keep pulling the cars on back" until he received a signal (R. 30, 34); that neither Moore nor anyone else had given him any signal or any instructions to stop, and there was no reason to make a stop, until after he saw Moore fall from the footboard (R. 32, 38), and that there wasn't any reason for Moore to have gotten off the footboard before the engine reached the switch (R. 32). He also said that he did not recall seeing a switch tender or anyone around the switch; that it was not necessary for him to get a signal or "OK" from a switch tender or anybody at the switch stand before coming out on the ladder track (R. 30, 36-37), and that Moore's fall occurred east of and before the tender reached the switch stand (R. 38).

Wilds stated that when he saw Moore fall, he "did everything I could to stop as quick as *I could*"; that he "shut off the throttle," put the brakes in emergency, turned on the sand and "threw the reverse bar in," and that from the time Moore "slumped", "it all happened within a couple of seconds" (R. 33-34). He further said he gave no warning that he was going to apply the brakes, after he saw Moore fall, because he didn't have time, and it was much more important to stop as quickly as he could (R. 36).

The other circumstances connected with the accident fully corroborate the testimony of engineer Wilds.

The weather was fair; and, as the accident thus happened in the daytime of a clear autumn day, about 3:50 P.M., on September 25, 1948, there was nothing in the weather conditions to interfere with the vision of engineer Wilds. And there was nothing to cause the plaintiff's decedent to fall on account of such or any other conditions brought home to the knowledge of the defendant, by which such an occurrence could reasonably have been foreseen or anticipated. That the grab-irons, handrail and footboards on the tender were in a good condition, is not questioned. Indeed this fact is confirmed—by the testimony of plaintiff's witness, Torrence, and by the further fact that there was not only no negligence charged as to the condition of the defendant's said appliances, or any other appliances; but the Complaint itself affirmatively avers that the defendant's locomotive was caused suddenly to apply its emergency brakes, "thereby causing the decedent to be thrown from a *position of safety on the rear of the tender of said locomotive.*" (Italics supplied). "A position of safety" can mean nothing else than that the defendant had furnished plaintiff's decedent a safe place to work on the rear of the tender of said locomotive, the place from which the decedent fortuitously fell at the time of the accident.

Plaintiff's decedent was an experienced brakeman, who had been promoted to conductor, but was braking at the time of the accident. He had been working for the defendant "pretty close to seven years". He was therefore thoroughly familiar with the work he was doing and the method by which it was being done (R. 12).

The way in which the decedent fell—he first "slumped", and in the next instant raising himself up, tumbled "head foremost", making a complete "somersault", "doubled up", landing on the ground "right up beside the rail of the track" on the back part of his head and shoulder, with his feet lying in a westwardly position at a kind of an angle to the track—shows in itself with reasonable certainty, that the decedent's fall was caused by something that happened to him internally and not by anything of an extraneous character. It was not what happened outside the decedent that caused him to fall, but what happened inside him (R. 26, 27, 40).

Considering the fact that the train was going only five miles an hour; that the decedent was of light weight (around 140 pounds) and small stature (about 5 feet, four and one-half inches in height); that he was in a "position of safety" (as alleged in the Complaint) holding to a safe handhold on the tender of the engine to which was attached a safe footboard, leaning out far enough for Wilds to see the edge of his shoulder; that he was only 32 years of age; that he was active enough and strong enough to have done similar work before in the same way, and appeared to have been in "real good health" and "real good spirits" before going to work that very day, as testified to by the plaintiff (R. 13, 14); that the train went the length of the engine and tender, a box car and part of another car, after the brakes were put on (R. 23)—all these circumstances would seem to indicate that, in all human probability, the putting on of the

brakes would not have caused the decedent to fall at all, the train not going faster than a man can walk, and the stop being gradual. Certainly, under the foregoing circumstances, if the decedent had been thrown off the tender on account of the sudden application of the brakes, he would not have turned a somersault and landed on his head, but his whole body would have been propelled forward; and, young as he was, and of undoubted agility as shown by his occupation, he would have jumped far enough outside the track to have landed on his feet in a safe position, or else run faster than the train was going until he got to a position of safety.

The testimony of Wilds is still further corroborated by a striking circumstance, developed in the evidence. This evidence confirms the fact testified to by Wilds, that the catastrophe which befell the decedent was the result of a *casus fortuitus*—an unforeseeable accident—and that specifically, it was due to a heart condition, the serious nature of which was apparently unknown to anyone, not even to Mr. Moore himself or his family. Mrs. Moore (the plaintiff) testified, as above stated, that he appeared to be in "real good health" and "real good spirits" when he left for work the afternoon of the accident. Also Wilds testified that when the deceased arrived at the Fulton Yards on that occasion, he seemed to be in good health and that he noticed nothing "unusual" about his appearance.

It is a matter of common knowledge that heart attacks frequently come at times when the patients appear to be in the best of health; and, hence, such unpredictable attacks are not capable of being foreseen or estimated. Accordingly, there is a maxim of the law in such cases, which reads as follows:

"*Casus fortuitus non est sperandus et nemo tenetur divinare.* 4 Co. 66—A fortuitous event is not to be foreseen, and no person is held bound to divine it." 2 Bouv. L.D. (Rawles Rev.) p. 347.

Within a year before the accident, on October 3, 1947, plaintiff's decedent had a heart attack, the nature of which was fully described by Dr. Kinloch Nelson, a witness for the defendant (R. 55-58).

The testimony of Dr. Nelson as to the heart trouble of the plaintiff's decedent is substantially confirmed by the testimony of the plaintiff herself (R. 13).

If, as the testimony shows, the decedent had suffered a thrombosis in one of the major arteries of his heart within a year before the accident and took a month to six weeks to recover therefrom; if he fainted at the time of the first attack; if he was more likely to have such a heart attack again than one who had never had such an attack, and should have "taken it easy" thereafter,—in the absence of any evidence to the contrary, can any reasonable person say that the decedent did not suddenly slump and fall from the footboard of the tender at the time of the accident, as testified to by engineer Wilds?

The foregoing circumstantial evidence is, we respectfully submit, not only consistent with the direct testimony of Wilds; but the circumstantial evidence alone, taken as a whole, is *inconsistent* with the theory of the plaintiff that the decedent was thrown off the tender by the sudden application of the brakes on the engine or train, which is the sole ground of negligence alleged in the Complaint.

The testimony of the plaintiff's witness Torrence, who was not a witness as to the facts of the accident, will be hereinafter referred to.

V

NATURE OF ARGUMENT PRESENTED IN PLAINTIFF'S BRIEF

The major contention of the plaintiff, as set forth on page 2 of her brief and repeated in substance at pages 7 and 37, is that there was evidence adduced on her behalf that "tended to show", that while Moore was standing on the footboard of the engine tender in the performance of his duties as brakeman, the engineer applied the emergency brakes to the engine, without warning, and thereby caused Moore to fall from the footboard.

It is conceded on pages 4, 18 and 37 of plaintiff's brief, that Wilds himself (admitted to be "the key witness"), actually testified that he could see Moore in the position which he occupied, standing on the footboard, and that he did not apply the brakes to the engine until after he saw Moore had fallen off and because of that fact. It is nevertheless argued on behalf of the plaintiff on pages 4, 9, 10, 18, 19 and 37 of her brief, that by reason of "several admissions" allegedly made by Wilds with respect to Moore's exact position on the footboard and certain other physical facts in the evidence, there was a self-contradiction, and the jury could find that it was "impossible" for him to have seen Moore on the footboard at all, immediately before the accident, and hence he did not see Moore until after he had fallen from the footboard, and that this was after the brakes had been applied.

Wilds, as we have seen, was the plaintiff's own witness. In no event should the testimony of a witness be twisted and tortured from its fair construction, or any part thereof torn from its context, so as to give the testimony a meaning which it would not otherwise possess; and least of all by the party who put him on the witness stand and hence

avouched his credibility. To be sure, a party may rely on the testimony of any witness whose testimony is in his favor; but he cannot distort the testimony into favorability by a misrepresentation thereof, or by the process of fragmentation.

As stated by Lord Erskine during the sedition trials of the 1790s, in adopting such a method of citation, one could prove from the Bible that "There is no God," simply by leaving out of the reference the statement, the fool said this in heart.

VI

ARGUMENT

No Self-Contradiction Created By Answers of Witness Wilds To "Standing-Up-Straight" Questions

The chief claim advanced in support of the alleged contradiction of the witness Wilds is, that after in direct examination, he had answered ten or more inquiries of plaintiff's counsel as to where and how Moore stood on the footboard, his duties and his means of signaling with his hand, he acquiesced in her counsel's use of the phrase "standing-up-straight," in two later questions, as applied to Moore's position and movements while the train was moving and before the brakes were applied (R. 25-26). Without any such narrow or specialized meaning being brought to the attention of the witness, it is now asserted that he thereby affirmed that Moore was standing in an exact perpendicular and plumb line position on the footboard, which fact could not have been true, because the outside edge of the footboard was ten inches inside the edge of the tender and in such a location he would be out of Wilds' range of vision.

It will be recalled that Wilds did not claim to be able to see Moore's entire body, but only "the edge of his shoulder

and arm" (R. 35). This was not enough of his body to enable him to affirm that Moore may not have been leaning more or less toward the left side. He expressly recognized in a related question, that he could not see the edge of the footboard on which Moore stood, since it was "short" of the engine and tender (R. 27). He did know that there was a handrail (grabiron) extending across the entire width of the tender, and that it was entirely appropriate for Moore to brace and support himself by means of this safety device installed for such a purpose—as indicated in the picture, Defendant's Exhibit "B". His answers to these questions should therefore be construed accordingly. Also, in the same series of questions, both the witness and counsel referred to the fact that Moore, just before falling, got in a "slumped" position, "as if his knees gave away"—as contrasted with his previous position when standing prepared to give a signal if needed. Here was a difference between positions which was of most significance to Wilds.

The opinion of the Court of Appeals, in referring to the words "standing-up-straight," makes the following observations, the correctness of which are now admitted in the brief of counsel for the plaintiff (R. 90):

> "It is worthy of note that these were the words of counsel, and not of the witness. They were carefully framed, for no other apparent purpose than to provide an excuse to contradict the engineer's testimony."

So far as concerns the candid admission made on pages 12 and 13 of plaintiff's brief, that the "standing-up-straight" phrase was supplied and suggested entirely by her counsel's questions, had negative answers been given by Wilds to these questions, the same counsel would undoubtedly have protested that the witness was being unreasonably meticulous, arbitrary and over literal. Of course the witness was

testifying as a practical railroad operating man, rather than as a precise physicist, mathematician, or expert on "semantics." The words were not inappropriate to the situation. Moore was certainly "standing up," so as to have the general characteristics of a straight line (2 Webster's New International Dictionary, Second Edition, 1939, page 2488), and in a position in which Wilds was accustomed to see a brakeman stand, when performing such an assignment as Moore was performing. He was at full height—not crouched.

The objection here, as pointed out by the Court of Appeals, is not as to the words suggested; but to the "strained and forced interpretation" of them, "when they admit of a natural, ordinary colloquial construction," which the witness unquestionably had in mind in his assent to their use by counsel. The self-contradiction sought to be inferred against the witness would be violative of fundamental principles of sound reasoning and just judgment. It involves the logical absurdity of trying to prove that Wilds could not see Moore, by Wilds' own testimony that he could see him! And that, too, merely by a verbal quibble. Hamlet had this kind of "verbal gymnastics" in mind when examining a skull thrown up by a grave-digger, which he supposed to be that of a lawyer, asks—evidently with a layman's disapproval of such unconscionable technique—"Where be his *quiddits* now, his *quillets*, his cases, his tenures and his *tricks*?" No wonder therefore, the Court of Appeals calls attention to the disfavor with which the law looks upon such casuistry (R. 90).

Thus, as stated by the Court of Appeals, the evidence of Wilds "fairly interpreted, shows, without contradiction, that he *could* see" Moore; and, accordingly, his testimony was in no wise self-contradictory.

In referring to defendant's photograph, Exhibit "B", which was used by Wilds in illustrating the way Moore was standing, the witness Torrence said (R. 46):

"The man shown here is not balanced. *We assumed that a man would be balanced on his own two feet. He is holding onto the grab iron here. Of course, he could stick out much further than that if he had chosen to lean out further supporting himself by his arm.*'" (Italics supplied).

* * * *

Q. In what position did *you* place him (i.e. person on the footboard) before *you* made *your observation—standing upright?*

A. *Standing upright,* his foot on the edge of the step, which was ten inches from the edge of the tender.

Q. A man *standing straight?*

A. *Upright, straight,* I could not see him when I put my head out of the side window." (Italics supplied).

The foregoing testimony shows there is no conflict whatsoever between Torrence's testimony and Wilds' testimony. Torrence conceded that if Moore was standing as illustrated in defendant's Exhibit "B", the decedent could have been seen by Wilds; and *Wilds testified that Moore was standing as was indicated in that picture.* Furthermore, Torrence's testimony was based upon the assumption that the man on the footboard was standing *upright,* "balanced on his own two feet." And all through his testimony, he recognized that the word "upright" was the technically correct word for the situation to which he referred; and not the word "straight." Even when his counsel asked him the leading question as to the man being "standing straight?", he first said "upright" before adding the word straight. The way Moore fell *outside the rail* of the track demonstrates the correctness of Wilds' positive testimony as to the way he was standing. Had Moore been standing "upright" on the footboard "balanced on his own two feet," as assumed by the witness Torrence—and it is merely a hypothetical assumption, since Torrence was not a witness to the evi-

dentiary facts of the transaction, either direct or circumstantial—he would obviously have fallen *between the rails of the track.*

It is worthy of observation that the propriety of Moore's position while standing on the footboard, in holding to the handrail or grab-iron—which was the natural and proper position for a brakeman acting in his line of duty, in order to be on the alert and "balanced" so as to give a signal from the moving train if and when such a signal became necessary—is not disputed by Torrence. In fact, Torrence frankly admitted that he had never operated an engine, and there is nothing in the record to show that he had ever participated, or had any experience, in railroad yard switching operations (R. 48-49).

Other Unwarranted Inferences Sought To Be Drawn From Wilds' Testimony

On pages 9 and 10 of the plaintiff's brief, it is asserted that Wilds made various statements concerning other circumstances, which show that he could not have seen Moore on the footboard at the time he tumbled off.

Thus it is claimed that Wilds admitted that he couldn't see Moore on the footboard or any signal he might give, except when Moore was giving such a signal by "reaching out from behind the tender." At no time was any such statement or admission made by Wilds.* On the contrary, as

*As to this argument, see opinion of Judge Hutcheson where this is said (R. 70):

> "It is argued in behalf of the plaintiff that the engineer could not have seen the decedent before he fell. If this is correct it does not weaken the defendant's case. There was no evidence of any obstruction or other reason for the engineer to apply the brakes until he saw the decedent fall and certainly there is no evidence whatever that the engine was brought to a stop before this occurred."

already shown, Wilds stated positively that the edge of Moore's left shoulder and arm were *continuously* in his view (R. 35), and that Moore was facing forward in the "same position," from the time the train movement started to the moment he began to "slump" (R. 33). It was in answer to plaintiff's counsel's own inquiry as to what "motion" and what "movement" did Moore make while still standing on the footboard, that Wilds said "he started to slump", and thereafter tumbled off (R. 25-26). Of course a brakeman on a footboard, with his back to an engineman, has to reach out or extend his arm in some direction in order to give a signal with his hand, otherwise his own body may well obscure his signal. But this does not mean that a part of his shoulder and arm could not already be in view, as Wilds distinctly said they were in this instance. As Wilds reiterated, the essential thing is for the brakeman *to get out in view himself*, where he could see signals as well as give them. Moore was in such a position and remained there (R. 24-25, 35).

It is also claimed on page 10 of plaintiff's brief, that the fact that Wilds testified (R. 22) that Moore was not giving any signal at the time of the accident, was another "admission" or "contradiction" on his part to the effect that he could not see Moore at that time. We are unable to follow counsel's basis of reasoning for this assertion—since the very opposite would logically appear to be true.

It is further claimed on page 10, as a contradiction, that Wilds said that Moore was not in position to give him any signal, "immediately before the accident." The complete context (R. 35-37) of the question and answer referred to (R. 37), plainly shows that they relate only to the situation existing after Moore had fallen from the footboard. Wilds had already clearly stated in various previous answers, how Moore remained in view and was in position, as was his

duty, to give signals to him, if needed, while standing on the footboard—the original back-up signal having been given from that very location (R. 31, 35). The inquiry here was, and Wilds so construed it, whether there could have been any reason for him to make an emergency stop, other than the fact of Moore's fall. And Wilds testified there was no other reason. He had seen that the switch point and track ahead were clear (R. 30, 33). (The Complaint had alleged "a hitherto unprecedented and unexpected change in the manner of shifting cars, i.e., that a sudden stop was to be made at the lead track," without warning to Wilds). Wilds did not say, as seems to be contended, that Moore at this stage was in a position of invisibility, so far as he was concerned, but on the contrary, in a position where he could not give any signal. Certainly Moore was in that sort of position, when, lying outside of the rail and flat on his back, Wilds saw him and applied the emergency brakes. Had Moore been on the footboard but out of sight, Wilds would not know whether he could give a signal or not; and if in such position, he would have been absent from his post of duty, which not only cannot be assumed; but, in fact, the presumption is to the contrary. *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, 34, 88 L. ed. 520, 524.

Also on page 10, as well as on page 19, of plaintiff's brief, it is claimed that Wilds contradicted his statement that he could see Moore standing on the footboard as he says he did, because "notwithstanding" he observed him "slump straight down and straighten himself up," "he did nothing." But this disregards Wilds' narrative statement that Moore "slumped" and "righted himself and all in a second's time he came tumbling head foremost * * * off the engine," as well as his subsequent answer that "it all happened within a couple of seconds" (R. 27, 34). Manifestly, there wasn't time to have stopped the train after Moore "slumped." A

premature effort to have done so, might well have endangered him in his place of safety, instead of aiding him. Besides, this contention is diametrically opposed to the sole allegation of negligence contained in the plaintiff's Complaint, and demonstrates the inexorable futility of the plaintiff's claim. The Complaint alleges that the defendant's negligence consisted in applying the brakes before the plaintiff's decedent fell: the contradictory position is here and now for the first time taken (without either evidence or allegations to support it) that defendant's negligence consisted in not applying the brakes before the plaintiff's decedent fell.

It is further claimed on page 10 of plaintiff's brief, that the fact that the engine and 33 cars, proceeding at a five mile per hour speed when the brakes were applied, stopped as soon as they did, "without air pressure on the cars behind," also contradicts Wilds. Apparently, the argument at this point is, that Wilds, in trying "to stop as quick as I could," acted too promptly and effectively—a unique complaint, and therefore must have applied the brakes earlier than he claimed. In any event, there was no evidence offered at the trial in support of any argument that the stop actually made, couldn't have been made in the manner recited and within the distance stated—none whatsoever.

It is also claimed on page 10, as well as page 12, of plaintiff's brief, that Wilds contradicted himself in another manner, namely, by making a demonstration in court, at counsel for the plaintiff's request, of how Moore slumped, straightened up and thereafter tumbled off of the engine. In support of such assertion, no evidence in the record is cited, and reliance is placed solely on counsel's own description *dehors* the record of what transpired. Obviously, this is not legal proof, even though it be accompanied with an avowal that "there is no evidence that counsel laid hands upon him and

pressed him straight down, or * * * raised him straight up." Nor was a grabiron provided for the witness.

In seeking to find a possible explanation for Wilds' applying the emergency brakes (other than the fact that Moore was seen by him to have fallen off), it is suggested on page 18 of the plaintiff's brief, that the jury could infer that Wilds, "not seeing a switch tender or anyone else around the switch" and "not seeing Moore on the footboard (since he was not reaching out giving a signal)", and not knowing whether "*they intended*" to take all of the thirty-three cars out through the switch at one time or stop and cut some of them off, "decided to make an emergency stop," and did so, to get this information.

Such a suggestion as to an experienced engineer, is utterly fanciful and unreasonable on its face. It disregards Wilds' emphatic statements, "I work by signals," and that he intended to "keep pulling the cars on back until I received a signal," until he cleared the switch, and "probably beyond" (R. 30). It likewise ignores his testimony that he did not have to get any signal from a switch tender or anyone at the switch stand, and that nothing was approaching from the opposite direction. To be remembered, also, is the fact that the movement then being made was the first move with the engine coupled to the cars since the crew came on duty (R. 37).

On pages 15 to 17 of plaintiff's brief, a contention is made for the first time in this litigation, that defendant's photograph, Exhibit "B", is "distorted"; that the view represented "was not correct", and was taken from an angle which "makes it appear that the engineer could see more than he could in fact see." The record discloses no objection whatever to have been made to this picture in either court below. The picture shows on its face that it was taken from a position closely in line with the edge of the tender and in no sense enlarges the actual view of the engineer in the cab

of Engine No. 114, the particular engine involved. Thus, only a number of projecting bolt or rivet heads are visible along the side of the tender, whereas had this picture been taken at an angle away from the track, the entire surface of the side of the tender would be disclosed. As reproduced and inserted between pages 14 and 15 of plaintiff's brief, this exhibit is in the form of a "photolithograph", or a picture of a picture. Parts of it have been cut off in the foreground at the bottom and on both sides. It is not as clear and presents a smaller background than the picture actually introduced. A photograph made directly from the original film, which is an exact duplicate of the picture introduced at the trial, and included in the original record at page 145, is therefore herewith inserted in the interest of accuracy.

The Fact That The Witness Is Adverse To The Plaintiff's Case Does Not Relieve The Plaintiff Of The Burden Of Proof.

Apart from the fact, as above shown, that the testimony of Wilds is in no wise discredited in this case, the Court of Appeals justly observes that the fact that Wilds was an employee of the defendant and a witness whom the plaintiff was compelled to call to prove her cause, "did not relieve her from the burden of producing evidence from which an inference of negligence could be drawn."

In *Eckenrode* v. *Penn. R. Co.*, 3rd Cir., 164 F. (2d), 996, aff'd. 335 U. S. 329, (cited in the opinion of the Court of Appeals), where all the plaintiff's witnesses were employees of the defendant and by leave of the trial Court, put on the stand by the plaintiff as adverse witnesses, the Court stated in a footnote, that although the plaintiff was not bound by their testimony, yet, "belief that testimony is false will not support an affirmative finding that the reverse of that testi-

mony is true. Plaintiff has the burden of establishing his case by direct or circumstantial evidence: that burden is not met by pointing to the fact that all the available witnesses are hostile, and will not testify in a manner which would support the complaint."

See also the cases therein cited, among them *Cruzan* v. *N.Y.C. & H. Riv. R.R.*, 227 Mass. 594, 116 N.E. 879, likewise a Federal Employers' Liability Act case.

In *Bunt* v. *Sierra Butte Gold Mining Co.*, 138 U. S. 483, 11 S. Ct. 464, 34 L. ed. 1031, a negligence case wherein the plaintiff had put on the witness stand the employees of the defendant company who were the only witnesses of the accident, the court sustained the action of the trial court in directing a verdict for the defendant, and in an unanimous opinion, speaking through Mr. Justice Gray, the Court said:

> "The suggestion that because the only witnesses of the accident, and whom therefore the plaintiffs were compelled to call, were in the defendant's employ and might be prejudicial in its favor, the question how far they were biased should have been submitted to the jury, is of no weight. Theirs being the only testimony on the point, disbelief of their testimony could not supply a want of proof."

In *Texas & N.O. R. Co.* v. *Grace* (1945) (Texas), 188 S.W. 2d, 378, plaintiff's decedent was killed, while sitting on a railroad track, by a freight train of the defendant. The negligence relied on was the alleged discovered peril of the decedent by the enginemen on the defendant's locomotive, in time to have averted the injury.

The Court said (at p. 380):

> "The point at which the deceased was struck was 133 feet north of the north line of Church Street. The train

was brought to a stop 429 feet beyond the point where the brakes were applied. The explanations given by the fireman and the engineer were reasonable, but since they were interested witnesses, the respondents would have us discard their testimony altogether. For the purposes of this opinion we may do so, but to discard the testimony of a witness on the ground that he is an interested witness does not authorize a Court to believe the opposite of what it imports. The fact that the testimony of an interested witness is not accepted as evidence in his favor does not operate to convert it into evidence against him."

No Unfavorable Inference From Alleged Failure Of Defendant To Introduce Conductor Holland As A Witness.

(1)

Apart from the fact that (1) Conductor Holland was not at the scene of the accident and *was not an eye-witness thereof*, and without any direct knowledge in regard thereto, no unfavorable inference against the defendant, as claimed in plaintiff's brief (p. 22), can be drawn from the alleged failure of the defendant to introduce Conductor Holland as a witness, for the following additional reasons, and upon the following well-established grounds, to-wit: (2) No such inference can be allowed to arise where the plaintiff has not made out any case at all; for the reason that such a presumption cannot be used to relieve the plaintiff of the burden of proving his case; and (3) Conductor Holland was summoned by the plaintiff and was present to testify as a witness "on behalf of the plaintiff" at the trial. See *praecipe* and subpoena with return thereon (R. 8-10).

(2)

No Unfavorable Inference Applicable Unless Prima Facie Case Made Out By The Plaintiff

The Virginia case of *Puckett* v. *Draper*, 158 S.E. 68, 156 Va. 238, cited at page 22 of the plaintiff's brief, was a case involving an alleged fraudulent conveyance, and in which the voluntary nature of the conveyance itself furnished a badge of fraud, and therefore established a prima facie case for the complainant.

A Virginia case directly in point in this connection, is that of *Arnold* v. *Wood*, 173 Va. 18, 24, 3 S.E. 2d 374, where on a demurrer to the evidence, in an automobile accident case, based on alleged negligence of the defendant, the Court said:

> "It is argued on behalf of the administratrix that since the defendants failed to call the truck driver as a witness, there is a presumption that the latter was guilty of negligence. The answer is that until the plaintiff made out a prima facie case there was no duty on the defendants to bring forward any evidence or to call any witness on their behalf.
>
> "In *Hendricks* v. *Virginia Electric & Power Co.*, 161 Va. 793, 172 S.E. 160, 162 we said:
>
> 'It is contended that presumptions unfavorable to the defendant exist because the motorman was not called as a witness. This rule does not apply where the plaintiff, bearing the burden of proof, which the law places upon him, has made out no case at all.
>
> 'There is no presumption against a defendant for failure to call witnesses when the plaintiff carrying the burden of proof has not made a prima facie case and such presumption cannot be used to relieve the plaintiff from the burden of proving his case.'"

See, to the same effect, 1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 32, p. 53; and 2 Wigmore on Evidence (3d ed.) Sec. 290, pp. 179-180. A contrary ruling, as pointed out by Prof. Wigmore and other authorities, would change the whole law as to the burden of proof.

The case of *Woods, Housing Expediter* v. *Graf*, 84 F. Supp. 893, cited in plaintiff's brief, p. 20, an action by the housing expediter to recover for rent overcharge, the defendant contended that by agreement with Blaisdell (the tenant) and his wife, the premises were rented for commercial purposes and were so used during the tenancy, and hence the premises involved were not subject to the regulations of the housing and rent act. Otherwise, Blaisdell would have been entitled to a refund of the overcharge. Blaisdell, however, failed to testify as to the agreement, and gave no reason for such failure.

Fole , District Judge, said:

> "In weighing the evidence I also lend great importance to the unexplained absence of Robert Blaisdell and his failure to testify in contradiction *to the proof of the defendant.*" (Italics supplied).

Blaisdell was the real party plaintiff in the case. Since a prima facie case against him had been made out by his opponent, his silence as to the agreement, without explanation, was held by the Court to be evidence of the most persuasive character against him. The other cases cited in this connection were similar cases, wherein individual parties to the suit were involved who failed to testify, in the face of adverse testimony in opposition to their contentions, and hence similar rulings were made. They are *Kirby* v. *Tallmadge*, 160 U. S. 379, 40 L. ed. 463, cited in *Cooper* v. *Dashey*, 290 U. S. 106, 78 L. ed. 203; *Bilokumsky* v. *Tod*,

263 U. S. 149, 68 L. ed. 221 and *Runkle* v. *Burnham*, 153 U. S. 216, 38 L. ed. 694.

The principles laid down in the foregoing cases are brought out in clear relief in the case of *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 52, 72 L. ed. 137, 151, commonly known as the "Teapot Dome" case. The suit was to cancel an oil and gas lease made by the United States to the Mammoth Oil Company. The Complaint alleged that the lease and agreement were made without authority of law and in consummation of a conspiracy to defraud the United States. H. F. Sinclair was the principal representative of the Company. He failed to testify in the case. The government introduced evidence sufficient to make out a prima facie case, without putting Sinclair upon the witness stand. The Court said:

> "*Having introduced evidence which, uncontradicted and unexplained, was sufficient to sustain its charge*, the United States was not required to call the principal representative of the Company. His silence makes strongly against the Company. It is as if he personally held the lease, were defendant, and failed to testify. * * * *While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supplied by the substantive evidence in the case* (*Northern R. Co.* v. *Page*, 274 U. S. 65, 74, 71 L. ed. 929, 933, 47 Sup. Ct. (Rep. 491), it justly may be inferred that he was not in position to combat or explain *away any fact or circumstances so supported by evidence and material to to the government's case*" (Italics supplied), citing, among other cases, *Runkle* v. *Burnham*, *Kirby* v. *Tallmadge*, and *Bilokumsky* v. *Todd*, *supra*, referred to in plaintiff's brief p. 20.

(3)

Conductor Holland a Witness in Behalf of Plaintiff

Since Conductor Holland was summoned by and present as a witness for the plaintiff, and since the burden of proof of negligence was upon the plaintiff, and since the plaintiff did not put him on the stand, if there is any adverse inference at all arising from such circumstances, that inference is plainly against the plaintiff.

In 1 Jones on Evidence (Civ. Cas.) 4th ed., Sec. 21, p. 51, this is said:

> "An adverse inference does not arise from a failure to call as a witness one whom the other party had the same opportunity of calling."

To the same effect is 53 Am. Jur. 531.

In *De Pascale* v. *Penn. R. Co.*, 180 F. 2d 825, where there was a verdict and judgment for the defendant, in an action by a conductor for personal injuries under the Federal Employers' Liability Act, the Court said (at p. 827):

> "Appellant's second point is a complaint against the defense for not calling track foreman Beaver as a witness. There is no substance to this. Beaver did not see the accident. Appellant claims that his knowledge of the condition of the yard was important. If so, his testimony could have been obtained without any real difficulty, especially as other evidence was actually taken on appellant's side of the matter in Ashtabula prior to trial. Beaver was present during the early stages of the trial. Request could have been made to the Court to insure his presence throughout the proceedings. He could have been subpoenaed while in Philadelphia."

Realizing that the plaintiff has not made out a case, plaintiff's counsel (at pages 20-21 of plaintiff's brief) in

effect now makes the unprecedented request, for the first time in his *brief* (not in her *petition*) in this court, for a new trial. He quotes from the opinion of Mr. Justice Frankfurter, in the admiralty case of *Johnson* v. *United States*, 333 U. S. 46, to the following effect:

> "Instead of entering judgment for *the party who had the burden of proof and did not meet it*, (Italics supplied), the Trial Judge should at least have called Dudder (co-worker) as the Court's witness."

Counsel then adds the following comments:

> "The plaintiff thought she had made out a case for the jury without calling the conductor. The Judge evidently thought so, because he submitted the narrow issue squarely to the jury. If the Judge changed his mind after the jury had drawn the inference of negligence, the Common law required him to award a new trial in setting aside the verdict of the jury *so that the plaintiff might call Holland or introduce expert testimony that the engineer could not possibly have stopped the train as quickly as he did*," etc. (Italics supplied).

In the first place, the Judge did not change his mind. He expressly submitted the case to the jury, *with his reservation of his right to rule on defendant's motion to direct a verdict for the defendant*, in accordance with Rule 50 of the Federal Rules of Civil Procedure.

In the second place, Conductor Holland was already in court, summoned as a witness for the plaintiff at the time of the trial. Setting aside the verdict and granting the plaintiff a new trial, under such circumstances, "so that the plaintiff might call Holland" as a witness, would be uncalled-for and expensive trifling with the dignity, the majesty, and

orderly procedure of the Court; and, it is respectfully submitted, nothing short of a travesty upon justice. See *Galloway* v. *U.S.*, 319 U.S., 372, 393.

The same observations may be made as to the request for the alleged opportunity "to introduce expert testimony" to supply the thus admitted insufficiency of evidence for the plaintiff. In addition to Conductor Holland, the yardmaster of the Fulton yard and one other member of the yard crew were summoned by the plaintiff to testify in her behalf, namely, Oscar P. Enroughty, yardmaster, and W. R. Gibson, brakeman (R. 8-9), and although all were present at the time of the trial, none of them was put upon the witness stand by the plaintiff.

The foregoing facts and admissions, we respectfully submit, in themselves point up to an unequivocal confession by the plaintiff's counsel that the plaintiff has failed to "make out a case."

Further comment seems unnecessary.

View

Where there is no evidence to support the plaintiff's case, as here, it is a favorite device of counsel for the plaintiff to claim that such deficiency is supplied by the view of the premises and property or instrumentalities involved, made by the jury. This case, it appears, is no exception to the rule. Thus, it is said at pages 11 and 19 of plaintiff's brief, that the jurors were shown the engine involved (No. 114) and made their own observations and tests, and their verdict indicates the result.

Since there is no pretension that there was any defect in the engine, tender or appliances connected therewith, and it alleged in the plaintiff's Complaint, that the defendant had furnished decedent a "position of safety" in which to work; since, further, detailed measurements of the engine and

tender of engine No. 114, were given by plaintiff's witness Torrence, Plaintiff's Exhibit No. 6, (R. 80); and since, still further, the plaintiff as well as the defendant, filed pictures of engine No. 114, in evidence, it is difficult to see how the jury, the Court, or the counsel, could have derived any greater information by a view than that which they already had. Cf. *C&O Ry. Co.* v. *Nickel*, 157 Va. 382, 161 S.E. 248; 64 C.J. Sec. 90, p. 89.

Again, by no possibility could a jury reasonably determine from a view of engine No. 114, whether decedent tumbled off the footboard of the tender prior or was thrown off subsequently to the application of the emergency brakes thereon, which is the sole question at issue in this case.

Moreover, the law is firmly established that a jury cannot base their verdict "on the result of their observations and tests" unsupported by the other evidence in the case, and the sworn testimony of witnesses.

Thus, in 2 Jones on Evidence (4th ed.), Sec. 408, p. 768, this is said:

> "Although a jury may properly act upon an inspection or view as evidence in the case, they are not justified in acting solely upon such evidence; that if their verdict is not supported by the other evidence it cannot stand."

In 53 Am. Jur., subject Trial, Section 451, p. 354, after alluding to the divergence among the cases to to whether a view can be regarded as evidence or not, states that even the rule that the jurors may consider knowledge acquired by them on a view as evidence and act thereon accordingly is "subject to the qualification that such evidence by itself and in the absence of other evidence tending to sustain the issue is not sufficient to sustain a verdict or finding."

VII

AUTHORITIES

An examination of the cases relied upon in the plaintiff's brief enforces the conclusion that not a single one discloses sufficient factual similarity as to have any bearing on the present case; the cases referred to being *Lavender* v. *Kurn*, 327 U. S. 645, 66 Sup. Ct. 740; *Gray* v. *Southern Pacific Company*, 145 P. 2d, 561; *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d, 378; *Eglsaer* v. *Scandrett*, 151 F. 2d, 562; *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, 64 Sup. Ct. 409.

In none of the foregoing cases was there positive direct testimony of an eye witness of the accident, as in the case at bar, whose uncontradicted testimony showed that there was no negligence on the part of the defendant whatsoever. All the foregoing cases were cases of circumstantial evidence, in which the respective courts held that there was evidence from which it might reasonably be inferred that the defendant was guilty of negligence, and that such negligence was the proximate cause of the accident.

In all of the foregoing cases cited by the plaintiff, there was evidence to show that the plaintiffs, or plaintiffs' decedents, were negligently injured by and through some agency or instrumentality of the respective defendants. Here there was no negligence at all, and no evidence from which any negligence might be inferred, either by any officers, agents or employees of the defendant, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment.

In short, there is but one single question in the present case, and that is whether the brakes were put on the train before or after the plaintiff's decedent fell. And without weighing contradictory evidence, drawing inferences, and

judging the credibility of witnesses (since there is no testimony by any other witness on that subject than the plaintiff's own witness, engineer Wilds, and from it no contradictory inferences can be drawn therefrom), or drawing ultimate conclusions as to facts within the legitimate province of the jury, it is respectfully submitted, that there is in the evidence, no room whatever for an honest difference of opinion on that single question, namely, that no brakes were put on the train until Wilds saw the plaintiff's decedent fall; and that Wilds, out of natural humanitarian motives, set the brakes in emergency himself, because of, and solely on account of the fact of the decedent's fall—a fact which took place before Wilds' own eyes and in the clear light of day; and concerning which there is not a scintilla of contradictory evidence, direct or circumstantial.

In the case of *Eglsaer* v. *Scandrett*, 151 F. 2d. 562, cited in the plaintiff's brief at pages 31-32, the negligence of the defendant was not disputed as having been established by the special verdict of the jury. The only question involved in that case, which was one of circumstantial evidence, was whether such negligence (a defective bell-ringer) was the proximate cause of the injury. The Court of Appeals (7th Cir.) overruled the trial court's action in sustaining the motion of the defendant to change the answer of the jury in favor of the plaintiff on the inquiry as to whether such negligence was the proximate cause of the injury; and the Court of Appeals said that, while the evidence gave them "pause" as to whether the jury's finding, as to such negligence being the proximate cause of the fatal injury to the plaintiff's decedent, was not objectionable on the ground of allowing speculation to do duty for probative facts, they were "somewhat influenced" in reaching their conclusion by the holding in the case of *Tennant* v. *Peoria, etc. R. Co.*, 321 U. S. 29, which was likewise a case of circumstantial

evidence wherein negligence was established and the whole case turned on the question of proximate cause—a question not involved in the present case, since here the case is utterly void of any evidence of negligence.

The Court cited that part of the *Tennant case*, relating to proximate cause which is quoted in the plaintiff's brief, pp. 31-32, but also added the following citation from the *Tennant case*, accurately and lucidly setting forth the principles governing the decisions in negligence cases, but which citation is omitted in the plaintiff's brief:

> "* * * It was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. * * * Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked' ".

The case of *Gray* v. *Southern Pacific Company*, 145 P. 2d. 361, cited in plaintiff's brief at pages 21-25, was likewise a case of circumstantial evidence, in which there was great conflict in the testimony both on the question of negligence and proximate cause, and hence presented a question of contradictory evidence as to the facts, the determination of which fell peculiarly within the province of a jury's functions.

The citation from the opinion of the Court contained at p. 24 of plaintiff's brief to the effect that—

> "They (i.e. the jury) could reject positive testimony and accept circumstantial evidence as proof of the facts, as it is elementary that direct evidence may be dis-

> believed and *contrary* (emphasis added) circumstantial evidence relied upon to support a verdict of finding"—

is an affirmation of the fact that the circumstantial evidence must be *inconsistent* with the direct testimony in such a case. If the circumstantial evidence, as in the present case, is consistent with the direct testimony, then as indicated by the foregoing citation, it is insufficient to support a finding contrary to the direct testimony.

At page 25 of the plaintiff's brief, the following citation is made from the case of *Kurimsky* v. *Unity Rys. Co.*, 55 A. 2d 378, wherein a brakeman was killed during switching operations when he was jolted off one of the cars as a result of engineer making sudden stop of the train to throw a caboose, without advising the brakeman of the change of orders for a switching movement:

> "The Court submitted to the jury whether 'there was a sudden jerk or jolt or jar of this train which threw Kurimsky from the train and to the tracks in such manner as to cause his death?' The Judge also said, *'If there was no sudden or unusual jerk or jolt of any kind, then of course there is no negligence in this case and the plaintiff's case falls.'*" (Italics supplied).

The above ruling of the Court is, we respectfully submit, a direct holding in favor of the defendant in the present case, and that for two reasons:

The uncontradicted evidence shows, (1) there was no sudden or unusual jerk or jolt of any kind prior to the brakeman's fall, and (2) the brakes were not put on the train until after the fall of the plaintiff's decedent.

In *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. ed. 916, suit was brought by Lavender, Administrator of the Estate of Haney, under the Federal Employers' Liability Act, against

the St. Louis-San Francisco Railway Company (Frisco), and the Illinois Central Railroad Company, in the Circuit Court of the City of St. Louis, Missouri. It was charged that Haney, while employed as a switch-tender by the defendants in the switchyard of the Grand Central Station in Memphis, Tennessee, was killed as a result of the defendants' negligence. There was a verdict and judgment for the plaintiff in the trial court, which on appeal by the defendants was reversed by the Supreme Court of Missouri. On certiorari, the judgment of the Supreme Court of Missouri was reversed, and the judgment of the trial court was affirmed as against both defendants.

As against the Frisco, it was held that the evidence was sufficient to support a verdict for the plaintiff for the death of the switch-tender, found near the track with a fractured skull, shortly after he had thrown a switch to permit a passenger train to back into its station, where it was shown that there was a mail hook hanging down loosely on the outside of the mail car of the backing train, and considering the height and swing out of the hook, the existence of an uneven mound of cinders and dirt near the track, on which the deceased was probably standing when hit, and the nature of the deceased's duties, it was a fair inference that he had been struck on the back of the head, although there was contrary evidence indicating that he could not possibly have been hit by the hook, and it was possible that he might have been murdered. As against the Illinois Central, it was held that the defendant had negligently failed to furnish the decedent a safe place to work.

The Court said (327 U. S. 649):

> "Both east and west of the switch, however, was an uneven mound of cinders and dirt rising at its highest points 18 to 24 inches above the top of the rails. Witnesses differed as to how close the mound approached

the rails, the estimates varying from 3 to 15 feet. But taking the figures most favorable to the petitioner, the mound extended to a point 6 to 12 inches north of the overhanging side of the mail car. If the mail hook end swung out 12 to 14 inches it would be 49 to 55 inches above the highest parts of the mound. Haney was 67½ inches tall. If he had been standing on the mound about a foot from the side of the mail car he could have been hit by the end of the mail hook, the exact point of contact depending upon the height of the mound at the particular point. His wound was about 4 inches below the top of his head, or 63½ inches above the point where he stood on the mound—well within the possible range of the mail hook end."

And at pages 652-653:

"We hold, however, that *there was sufficient evidence of negligence on the part of both the Frisco trustees and the Illinois Central* to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury. (Italics supplied).

The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be

unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.

It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring ~~that the~~ hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

Moreover, the Court added the following statement (at p. 653):

> *"Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."* (Italics supplied).

(a) The case at bar, as has been abundantly shown, comes within the very terms of the last-mentioned statement of the law contained in the cited case. There is a complete absence of *probative facts* to support the verdict of the jury in the present case, and, as said in the case of *Tennant* v. *Peoria, etc. R. Co., supra*, "The essential requirement is that mere speculation be not allowed to do duty for probative facts."

(b) There was no eye-witness to the accident in the cited case. The traditional, historic and familiar test for determining whether the case was one for the jury was adopted by both appellate courts, namely, whether the evidence was sufficient for a reasonable person (i.e. the ideal reasonable

person of the law) to hold that the defendants were guilty of negligence and that such negligence was in whole or part the proximate cause of the accident. The divergence between the Supreme Court of Missouri and this Honorable Court was in the application of the said test. The Supreme Court of Missouri held that the evidence was insufficient to satisfy the foregoing test. This Court—after a full consideration and a just and painstaking evaluation of the evidence—held the contrary. This Court said:

> "* * * The inference that Haney was killed by the hook cannot be said to be unsupported by probative facts, or to be so unreasonable as to warrant taking the case from the jury."

Hence, in the case at bar, the learned and able trial judge, the Honorable Sterling Hutcheson, after citing the foregoing cases of *Lavender* v. *Kurn*, and *Tennant* v. *Peoria*, *supra*, said in his opinion, and it is worthy of repetition in this connection:

> "* * * As I understand the cases, there must be shown some act or conduct from which it is reasonably possible to infer negligence. Applying this test to the facts of the instant case, it is my opinion that there is no evidence upon which the question of negligence should have been submitted to the jury."

(c) In the present case, there is positive, direct, and uncontradicted testimony of an eye-witness—the only eye-witness to the accident—who was put on the stand as a witness for the plaintiff. He was the locomotive engineer, Wilds. As has been stated before, Wilds testified positively, unequivocally and emphatically, not only to the effect that the brakes were not put on the locomotive and train until after the plaintiff's decedent's fall, but that *he personally*

saw the plaintiff's decedent fall, and applied the brakes himself subsequent to, and solely because of the decedent's fall.

As to the fact of Moore's fall from the footboard, Wilds' testimony was thus (to use the language of Cicero, the most modern of ancient logicians, when he told the judges that his witness proved that Archias his client had been enrolled as a citizen of Heraclea), not that he *thought it*, but that *he knew it;* not that he had *heard of it*, but that he *saw it*—and, as to the fact of the brakes not having been put on until after Moore's fall, Wilds' testimony is not merely that he was present when this was done, *but that he did it himself.*

And as to the foregoing testimony of Wilds, the Court of Appeals says in its opinion (R. 91):

> "No fact was brought to light which could support an inference that the engineer stopped the train for any other reason than that which he gave in his testimony."

Finally, it is contended by the plaintiff that the Seventh Amendment of the Constitution of the United States, as interpreted by the case of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364 (1912), prohibits a direction of verdict by Federal Courts. Surely, this contention is nothing less than sheer desperation. Mr. Justice VanDeventer, who delivered the majority opinion of the Court in the *Slocum case*, in the case of *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 79 L. ed. 1636, speaking for the unanimous Court, shows that the plaintiff has completely misunderstood the nature of the decision in the *Slocum case*; and that, in fact, the *Slocum case* is a definite authority against the plaintiff's contention; that the *Slocum case* had merely decided that where the trial court had submitted the case to the jury *without reservation* of the question of the sufficiency of the evidence, on a motion to direct a verdict (which was overruled by the trial court), the appellate court could not set aside the ruling of the trial court in failing to direct a verdict

for the defendant and itself determine the issues of fact and direct a judgment for the defendant; but, under the Seventh Amendment, the direction should have been for a new trial.

In the *Redman case* this is said (pp. 658-659):

> "A very different situation is disclosed in the present case. The trial court *expressly reserved its ruling on the defendant's motions* to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. *Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court.* The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings. No objection was made to the reservation or this mode of proceeding, and they must be regarded as having the tacit consent of the parties." (Italics supplied).

The entire question under discussion was fully considered, determined and seemingly foreclosed in the recent case of *Galloway* v. *U. S.*, 319 U. S., 372, 87 L. ed. 1458 (1943), and in footnote 30 of the majority opinion, this is said:

> "We have not given special consideration to the latest decisions touching the Amendment's effects in the different situations where a verdict has been taken, on the one hand, *without reservation of the question* of the sufficiency of the evidence, Slocum v. New York L. Ins. Co., 228 U. S. 364, 57 L. ed. 879, 33 S. Ct. 523, Ann. Cas. 1914 (D) 1029, and, on the other hand, *with such* a reservation, Baltimore & C. Line v. Redman, 295 U. S. 654, 79 L. ed. 1636, 55 S. Ct. 890. Cf. Ætna Ins. Co. v. Kennedy, 301 U. S. 389, 81 L. ed 1177, 57 S. Ct. 809. Whatever may be the exact effect of the latter and, more recently, of Rule 50 of the Federal Rules of Civil Procedure upon the former decision, it suffices to say that, notwithstanding the sharp division engendered in the Slocum case, there was no disagreement in it or in the Redman case concerning the validity of the practice

of directing a verdict. On the contrary, the opinions make it plain that this was unquestioned and in fact conceded by all." (Italics supplied).

In the present case, the Court expressly submitted the case to the jury subject to the reservation of the Court's determination of the question of the sufficiency of the evidence under Rule 50 of the Federal Rules of Civil Procedure, as to which reservation and procedure there was no objection by the plaintiff. (R. 60, 71).

Furthermore, the contention in question, now made on behalf of the plaintiff, was not only not made in the trial court, or the Court of Appeals, but it was not presented in the petition for writ of certiorari to this Honorable Court.

VIII

CONCLUSION

In conclusion, it is submitted, that for the reasons herein set forth, the judgments entered by both the District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit were plainly right, and that the judgment of the latter Court should therefore be affirmed.

Respectfully submitted,

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